**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION**

ADVANCEME, INC.	§	
	§	
Plaintiff,	§	
	§	
v.	§	
	§	**CAUSE NO. 6:05-CV-424 (LED)-(JDL)**
RAPIDPAY, LLC, BUSINESS CAPITAL	§	
CORPORATION, FIRST FUNDS LLC,	§	**Request for Oral Hearing**
MERCHANT MONEY TREE, INC.,	§	
REACH FINANCIAL, LLC and	§	
FAST TRANSACT, INC. d/b/a	§	
SIMPLE CASH,	§	
	§	
Defendants.	§	

DEFENDANTS' RESPONSE TO PLAINTIFF'S OBJECTIONS TO EVIDENCE AND ARGUMENT IN DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT OF PATENT INVALIDITY

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INTRODUCTION

In an apparent attempt to divert the Court's attention from the pertinent issues in Defendants Reach Financial, LLC's, Merchant Money Tree, Inc.'s, and First Funds, LLC's ("Defendants") Motion for Partial Summary Judgment of Patent Invalidity ("Motion for Summary Judgment"), AdvanceMe, Inc. ("AdvanceMe" or "Plaintiff") filed over 250 objections to Defendants' Summary Judgment evidence. *See* AdvanceMe's Objections to Defendants' Evidence and Arguments in Support of their Motion for Partial Summary Judgment of Patent Invalidity ("Objections"). These unfounded objections should all be overruled.

The vast majority of Plaintiff's Objections stem from the fact that Defendants followed the local rules and did not specifically cite and attach the deposition testimony that authenticated each exhibit contained in the Motion for Summary Judgment or the deposition testimony that laid the foundation of personal knowledge for all testimony cited in the Motion for Summary Judgment. Plaintiff filed the Objections without consideration of the local rule specifying that only relevant cited to excerpts of evidentiary materials should be attached to a Motion for Summary Judgment. Plaintiff further ignored testimony, which was offered under oath in the presence of Plaintiff's counsel during the depositions for this matter, in which the evidence cited by Defendants was properly authenticated. The deponents also established their personal knowledge of the subject matter of their testimony in the presence of Plaintiff's counsel. Yet, Plaintiff filed approximately 250 unfounded objections.

Plaintiff's hundreds of objections are absurd, at best, and would result in an extreme waste of judicial resources if the Court were forced to address each objection. By way of example and not by limitation, Plaintiff objects to copies of deposition transcripts that are certified by the relevant court reporter. Plaintiff does not allege that the transcripts have been altered in any way, but still asserts that they have not been properly authenticated. Plaintiff also objects to an exhibit that Plaintiff itself attaches to its own Response. Plaintiff questions the authenticity of documents that Plaintiff itself offered into evidence during depositions. Plaintiff further calls into question the authenticity of documents that Plaintiff's counsel established during questioning of the deponents.

Additionally, Plaintiff attempts to avoid summary judgment of invalidity by requesting that the Court exclude evidence and argument related to two subsections of 35 U.S.C. § 102, as well as evidence and argument related to the Litle & Co. Hanover Finance Program. Plaintiff's objections regarding 35 U.S.C. § 102(a) and (g) and the Litle & Co. Hanover Finance Program, as explained below, are premised on a misunderstanding—or feigned misunderstanding—of the Patent Rules. Because Defendants timely served invalidity contentions that comply with the Patent Rules and disclosed all facts related to the Litle & Co. Postage Advance and Hanover Finance Programs necessary to assert invalidity based on both programs under 35 U.S.C. § 102(a), (b) and (g)(2), Plaintiff's objections should be overruled.

In short, Plaintiff's Objections are frivolous. But to avoid waiver and in the event this Court wishes to address each of Plaintiff's Objections, Defendants respectfully respond to each objection as follows: [1]

[1] Defendants were forced to file this Response to Plaintiff's Objections as a "Reply" in the ECF system because Plaintiff filed the Objections incorrectly (as a "Response" to the Motion for Summary Judgment rather than as a separate Motion to Strike). Defendants respectfully request that this Response to the Objections not be considered part of its Reply in Support of its Motion for Summary Judgment for purposes of page limitations. In the event this Response is considered a Reply in support of Defendants' Motion for Summary Judgment, Defendants respectfully request leave to exceed the page limits to accommodate this Response.

ARGUMENT AND AUTHORITIES

I. 35 U.S.C. § 102(a) and (g)

Plaintiff argues that the Court should disregard all evidence and argument relating to 35 U.S.C. § 102(a) and (g) because these provisions "have ***never*** been asserted in any authorized invalidity contentions served by the Defendants in this action." (Objections at 2.) (emphasis in original).

A. Defendants Timely Served Their Third Amended P.R. 3-3 Invalidity Contentions

As AdvanceMe acknowledges, P.R. 3-6(a)(2) permits Defendants to serve amended invalidity contentions without leave of Court—not later than 50 days after service by the Court of its Claim Construction Ruling—because Plaintiff served amended infringement contentions pursuant to P.R. 3-6(a). (*Id.* at 3.) Patent Rule 3-6(a)(2) imposes no limitation on such amended invalidity contentions and does not require leave of Court to serve such contentions.

According to Local Rule CV-77(A), "Notice by e-mail by the clerk that occurs after 5:00 p.m. on any business day is deemed effective as of the following business day." (*See also* Local Rule CV-5(a)(3)(C).) The Court's Claim Construction ruling was filed at 5:29 PM CST and notice was distributed at 5:31 PM CST on December 21, 2006, and was thus deemed served on Defendants on December 22, 2006. (Ex. A, Notice of Electronic Filing of December 21, 2006 Memorandum Opinion and Order.) Therefore, the 50-day deadline for service of Defendants' amended invalidity contentions was February 12, 2007.[2] On February 12, 2007, Defendants served their Third Amended Invalidity Contentions pursuant to P.R. 3-6(a)(2) via electronic mail and U.S. mail, as stated in the certificate of service. (Ex. B, Defendants' Third Amended

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[2] Plaintiff's misunderstanding of Local Rule CV-77(A) results in a miscalculation of a February 9, 2007 due date. February 10, 2007 was a Saturday and thus the 50-day deadline for submitting amended invalidity contentions under P.R. 3-6(a)(2) was the following Monday, February 12, 2007.

Invalidity Contentions at Certificate of Service.) Defendants thus timely served amended invalidity contentions under P.R. 3-6(a)(2), and Plaintiff's timeliness objection lacks merit.

B. Patent Rule 3-3 Does NOT Require Defendants to Specify the Provision(s) Relied Upon in Their Invalidity Contentions

Patent Rule 3-3 requires invalidity contentions to include, among other things, "[t]he identity of each item of prior art that allegedly anticipates each asserted claim or renders it obvious . . . [and a] chart identifying where specifically in each alleged item of prior art each element of each asserted claim is found . . ." Patent Rule 3-3 imposes additional requirements for 35 U.S.C. § 102(b), (f), and (g)—but not for 35 U.S.C. § 102(a). Contrary to Plaintiff's misunderstanding of the Patent Rules, P.R. 3-3 does not require Defendants to specify under which subsection the patent is invalid; it simply imposes additional requirements if a defendant is asserting invalidity under 35 U.S.C. § 102(b), (f), and/or (g). Defendants were thus never required to specify that they intended to assert invalidity under 35 U.S.C. § 102(a), and Plaintiff's claims of prejudice due to such a "new" theory of invalidity is specious.

Indeed, it is difficult to imagine how Plaintiff would not have known that a prior art method and system that was publicly known more than one year prior to the date of the application for patent in the United States (35 U.S.C. § 102(b)) was not also publicly known and used by others in this country at any time before the application date (35 U.S.C. § 102(a)).[3]

Because Plaintiff does not object to Defendants' invalidity argument based on 35 U.S.C. § 102(b), and because P.R. 3-3 imposes no additional requirements for asserting invalidity under 35 U.S.C. § 102(a), the only relevant P.R. 3-3 requirement relates to 35 U.S.C. § 102(g). Patent Rule 3-3(a) specifies that "[p]rior art under 35 U.S.C. § 102(g) shall be identified by providing

[3] As described in Defendants' Motion for Summary Judgment, the invention date of the '281 patent is the July 9, 1997 priority date. Defendants' Motion for Summary Judgment at 5. AdvanceMe does not dispute this fact in its Response.

the identities of the person(s) or entities involved in and the circumstances surrounding the making of the invention before the patent applicant(s) . . ." Because Defendants specifically complied with this requirement in their Third Amended Invalidity Contentions, served February 12, 2007, *see* Ex. B at 8 (identifying Tim Litle, Randall Bourne and/or Larry Bouchard and describing the circumstances surrounding their invention), Plaintiff's objection relating to 35 U.S.C. § 102(g) should be denied.

C. The Evidence Relied Upon by Defendants to Support Invalidity under 35 U.S.C. § 102(a) and (g) is Identical to That Relied Upon for Invalidity under 35 U.S.C. § 102(b)

In addition to timely serving amended invalidity contentions pursuant to P.R. 3-6(a)(2) and complying with all relevant provisions of P.R. 3-3, AdvanceMe's last ditch "prejudice" argument should be rejected. As explained in Defendants' Motion for Summary Judgment, "[t]he evidence relied on by Defendants to anticipate the claims under 35 U.S.C. § 102(a), (b), and (g)(2) is identical." (Motion for Summary Judgment at 2 n.5.) Because the evidence relied upon for invalidity is identical under each of these sections (identical prior art reference, identical documents, identical deposition testimony), Plaintiff's hypothetical claim of prejudice should be disregarded.

As support for its claims of prejudice, Plaintiff cites two cases—both of which reveal the lack of merit in its objections. First, Plaintiff cites one case that addresses the inclusion of new invalidating references and not "new theories" involving the same reference, as Plaintiff now claims. *See, e.g.*, Objections at 4 (citing *Mass. Inst. of Tech. v. Abacus Software*, 462 F.3d 1344, 1365 (Fed. Cir. 2006)). The other case cited relates to a patentee's attempt to assert the doctrine of equivalents based on the blanket assertion that "any element not found to be literally met is equivalently met," without describing an equivalence theory, which the Court properly rejected. Objections at 4 (citing *Nike v. Adidas Am. Inc.*, No. 9:06-CV-43, 2007 WL 915154 (E.D. Tex.

Mar. 21, 2007)). It is apparent that Plaintiff is attempting to exclude argument related to 35 U.S.C. § 102(a) and (g) in order to somehow avoid invalidation of the '281 patent.

Because Defendants timely served invalidity contentions pursuant to P.R. 3-6(a)(2) and complied with all requirements of P.R. 3-3, the Court should overrule Plaintiff's objection.

II. Hanover Finance

As Plaintiff acknowledges, Defendants disclosed Hanover Finance in their Second Amended Invalidity Contentions, served August 30, 2006. (Objections at 5.) Plaintiff argues, however, that Hanover Finance is not specifically mentioned for each element of the claim chart accompanying Defendants' Second Amended Invalidity Contentions and, therefore, the Court should exclude the Litle & Co. Hanover Finance Program from consideration. *Id.* Such an argument reveals Plaintiff's desperation and should be given no credence.

As explained in Defendants' Motion for Summary Judgment, the Hanover Finance Program was a program in which all claimed steps are performed by the merchant, the Litle Processing Entity, and Hanover Finance (or other computerized payment receiver or third party). (Motion for Summary Judgment at 18-19, 23-24.) Not surprisingly, Hanover Finance does not appear in the invalidity claim chart next to the steps it does not perform. (Ex. B at Litle & Co. Invalidity Claim Chart.) As Plaintiff acknowledges, Hanover Finance appears in the forwarding element of claim 1 (Objections at 5) thus revealing that Defendants disclosed that Hanover Finance was the computerized payment receiver (claim 1) and third party (claim 10) to which the Litle Processing Entity forwarded portions of payments.

Because Plaintiff has no substantive arguments opposing Defendants' explanation of the claims' invalidity in light of the Hanover Finance Program, as explained in Defendants' Reply Brief filed contemporaneously herewith, it now attempts to exclude only the Hanover Finance

Program from the Court's consideration—even though the Postage Advance Program likewise does not appear in the invalidity chart next to the steps it does not perform. (Ex. B at Litle & Co. Invalidity Claim Chart.) Indeed, this is necessarily the case due to the '281 patent claims' requirement that multiple entities perform the claimed method steps.

Because Defendants complied with P.R. 3-3 by disclosing the Litle & Co. prior art reference (including both the Hanover Finance and Postage Advance programs) and identifying where specifically in the Litle & Co. prior art reference each element of each asserted claim is found (as of August 30, 2006), Plaintiff's objection regarding the Hanover Finance Program should be overruled. Plaintiff's desperate attempt to prevent summary judgment based on a frivolous procedural objection emphasizes the merit of Defendants' invalidity argument based on the Litle & Co. prior art.

III. Exhibit B to Motion for Summary Judgment

Local Rule CV-56(d) provides: "Only relevant, cited-to excerpts of evidentiary materials should be attached to [a Motion for Summary Judgment] or the response." As a result, and because all of Defendants' Summary Judgment evidence was properly authenticated under Federal Rule of Evidence 901 at previous depositions, Defendants did not cite or attach all of the deposition testimony corresponding to the authentication for the exhibits. Defendants did not anticipate that Plaintiff would burden this Court with objections to Defendants' Summary Judgment evidence that Plaintiff knows are unwarranted, as counsel for Plaintiff attended the depositions. As Plaintiff is fully aware, Exhibit B and other evidence attached to Defendants' Motion for Summary Judgment have been properly authenticated, under oath and subject to cross examination, on numerous occasions. Under Federal Rule of Evidence 901(b)(1), testimony from a witness with knowledge that a matter is what it is claimed to be satisfies Rule 901's authentication requirements.

Exhibit B has been properly authenticated at least four times in this matter.[4] Plaintiff's counsel entered Exhibit B into evidence at the deposition of Allen Abbott, and Exhibit B was subsequently authenticated by Mr. Abbott.[5] (Ex. C, attached hereto, Abbott Dep. 18:8-24.) It was also authenticated by Mr. Litle. (Ex. D, attached hereto, Litle Dep. 29:8-30:10.) It was also authenticated by Mr. Bouchard. (Ex. E, attached hereto, Bouchard Dep. 11:5-12:3.) And, it was authenticated by Mr. Bourne in his declaration. (Ex. N to Motion for Summary Judgment.)

Plaintiff's accusation that Defendants failed to comply with Local Rule CV-56(d) with respect to Exhibit B is similarly absurd. Plaintiff attempts to characterize the cited provision as a mandatory requirement despite the plain language of the cited provision: "The phrase 'appropriate citations' means that any excerpted evidentiary materials that are attached to the motion or the response should be referred to by page and, if possible, by line. Counsel are strongly encouraged to highlight or underline the cited portion of any attached evidentiary materials, unless the citation encompasses the entire page." (emphasis added). Despite the fact that Local Rule 56-d does not constitute a mandatory requirement, Defendants conformed with the provision to the extent possible. Plaintiff's request to strike Exhibit B in its entirety is baseless and has no support in the local rules.

IV. Exhibits C and D to Motion for Summary Judgment

Exhibit C was properly authenticated by Mr. Litle in his deposition. (Ex. D, attached hereto, Litle Dep. 111:13-112:8.) A portion of Exhibit C (LI_00004) was also properly authenticated by Mr. Abbott. (Ex. C, attached hereto, Abbott Dep. 80:15-24.)

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[4] Exhibit B and other documentary exhibits attached to Defendants' Motion for Summary Judgment are not exact copies of the deposition exhibits only because they do not bear the deposition exhibit sticker. Other than the absence of these stickers, the documents are the same and Plaintiff does not argue, much less put forth any evidence, that the exhibits have been altered in any way.

[5] The majority of the deposition testimony attached to this Response was included in the Motion for Summary Judgment. However, because Defendants did not anticipate Plaintiff's unfounded objections, the transcripts were not highlighted for authentication and foundation purposes. For the Court's convenience, the deposition pages corresponding to authentication, with the related testimony highlighted, are attached.

Portions of Exhibit D (LI_00033 to LI_00035) were properly authenticated by Mr. Litle in his deposition. (Ex. D, attached hereto, Litle Dep. 87:1-17.) Other portions of Exhibit D (LI_00033, LI_00035, LI_00036, LI_00038, LI_00040, LI_00042, LI_00055, LI_00057) were properly authenticated by Mr. Bouchard. (Ex. E, attached hereto, Bouchard Dep. 83:21-84:8.)

V. Exhibit E to Motion for Summary Judgment

Exhibit E was properly authenticated by Mr. Litle in his deposition. (Ex. D, attached hereto, Litle Dep. 100:2-101:2.) Portions of Exhibit E (LI_00065-LI_00066) were also introduced by Plaintiff and authenticated by Mr. Abbott. (Ex. C, attached hereto, Abbott Dep. 65:19-67:17.)

Plaintiff's hearsay objection with respect to Exhibit E is similarly inappropriate. Exhibit E amounts to a proposal to enter into a contract. It is not being offered for the truth of the matter asserted in the proposal. Rather, it is being offered as a proposal, which has independent legal significance and is not hearsay. *Kepner-Tregoe, Inc. v. Leadership Software, Inc.*, 12 F.3d 527, 540 (5th Cir. 1994). Thus, the admission of the proposal to prove the operative fact of its existence cannot be the subject of a valid hearsay objection. *Id.*; *See also Springfield Oil Servs., Inc. v. Meek*, No. CA3:96-CV-0009-BC, 1997 WL148023, at *3 (N.D. Tex. March 24, 1997) (a "signed agreement or promissory note is a writing embodying a 'verbal act' with independent legal significance and, as such, is not hearsay").

VI. Exhibit F to Motion for Summary Judgment

Exhibit F was properly authenticated by Mr. Litle in his deposition. (Ex. D, attached hereto, Litle Dep. 100:2-20.) Further, Exhibit F falls under two exceptions to the hearsay rule. The interoffice memorandum was Mr. Litle's present sense impression of postage advance on January 24, 1990 (Federal Rule of Evidence 803(1)), and it constitutes a record of regularly conducted activity (Federal Rule of Evidence 803(6)).

VII. Exhibits G and H to Motion for Summary Judgment

Exhibits G and H are proposals with independent legal significance. Thus, they are not hearsay. *Kepner-Tregoe*, 12 F.3d at 540.

VIII. Exhibit I to Motion for Summary Judgment

Exhibit I was properly authenticated by Mr. Litle in his deposition. (Ex. D, attached hereto, Litle Dep. 67:7-69:18.) It was also authenticated by Mr. Bouchard. (Ex. E, attached hereto, Bouchard Dep. 112:3-24.)

Exhibit I is a contract with independent legal significance. As a result, it is not hearsay. *Kepner-Tregoe*, 12 F.3d 527 at 540.

IX. Exhibits J and K to Motion for Summary Judgment

Exhibit J is self authenticating under Federal Rule of Evidence 902(6). Nonetheless, it is further authenticated by Mr. Litle. (Ex. D, attached hereto, Litle Dep. 82:24-85:22.) Exhibit J is not hearsay. It is not being offered for the truth of the matter asserted. Rather, it is being offered, in part, to show the public awareness and/or knowledge that Litle & Co. afforded such a program. And, as explained in Defendants' briefing, Exhibit J constitutes an invalidating printed publication for purposes of 35 U.S.C. § 102(b).

Exhibit K is self authenticating under Federal Rule of Evidence 902(6). Nonetheless, it is further authenticated by Mr. Litle. (Ex. D, attached hereto, Litle Dep. 11:5-12:11.) Mr. Litle confirmed that the article accurately described his company's background and what his company did. (*Id*. at 12:9-11.) Exhibit K is not hearsay. It is not being offered for the truth of the matter asserted. Rather it is being offered to show public awareness and/or knowledge about Mr. Litle's experience and success in the payment processing industry.

X. Exhibits L, M, O, Q, and R to Motion for Summary Judgment

Exhibit L contains a certification by Denise M. Rae, the certified shorthand reporter and notary public, who was present at Mr. Litle's deposition and transcribed the same. (Ex. L to Motion for Summary Judgment at p. 306:1-24.) Exhibit M contains a certification by Maureen O'Connor Pollard, the certified shorthand reporter and notary public, who was present at Mr. Bouchard's deposition and transcribed the same. (Ex. M to Motion for Summary Judgment at 199:1-23.) Exhibit O contains a certification by Katherine D. Nichols, the certified shorthand reporter and notary public, who was present at Mr. Bourne's deposition and transcribed the same. (Ex. O to Motion for Summary Judgment at 104.) Exhibit Q contains a certification by Elisabeth F. Nason, the certified shorthand reporter and notary public, who was present at Mr. Abbott's deposition and transcribed the same. (Ex. Q to Motion for Summary Judgment at certificate page.) Exhibit R contains a certification by Ellen Marie Gumpel, the certified shorthand reporter and notary public, who was present at Mr. Burnside's deposition and transcribed the same. (Ex. R to Motion for Summary Judgment at 387.)

Plaintiff has not argued, much less offered proof, that the deposition transcripts have been altered in any way. Thus, Plaintiff's position with respect to authentication of the deposition transcripts is without merit. *See Notley v. Sterling Bank*, No. 3:06-CV-0536-G, slip op., 2007 WL 188682, at *3 (Bankr. N.D. Tex. January 24, 2007) (rejecting party's argument that deposition transcript was not properly authenticated when party presented no evidence that the deposition transcript was inaccurate or that someone had tampered with the transcript).

In Plaintiff's approximately 85 other objections with respect to Exhibit L, approximately 89 other objections with respect to Exhibit M, approximately 35 other objections with respect to Exhibit O, and approximately 21 other objections with respect to Exhibit Q, Plaintiff makes the following objections: (1) lack of foundation regarding personal knowledge; (2) speculation; (3) leading; (4) inadmissible legal conclusion and lay opinion; (5) vague and ambiguous; (6) compound; (7) hearsay; (8) attempt to prove content of document with secondary evidence; and (9) irrelevant.

Defendants dispute each of Plaintiff's objections. Plaintiff bears the burden in articulating the reason for each objection, and Plaintiff has utterly failed to meet this burden. Rather, Plaintiff provides a range of testimony (apparently wanting both this Court and Defendants to guess which specific testimony Plaintiff claims is objectionable), and then throws in everything but the kitchen sink with respect to objections without taking into account whether the objections have any merit. They do not.

The range of testimony cited by Plaintiff is not speculative. It is relevant. It is not vague and ambiguous. It does not amount to inadmissible legal conclusions. The testimony does not amount to an attempt to prove contents of a document with secondary evidence. It is not hearsay. Further, the threshold for admitting testimony under Federal Rule of Evidence 602 is low. The fact that a witness does not state that he is competent to testify to each response he gives does not doom his testimony with respect to Federal Rule of Evidence 602. *DIRECTV, Inc. v. Budden*, 420 F.3d 521, 530 (5th Cir. 2005); *see also Diamond Offshore Co. v. A & B Builders, Inc.*, 302 F.3d 531, 544 n.13 (5th Cir. 2002) (finding that it was not abuse of discretion to consider information in affidavits where affiant stated his position in the company, stated that he had reviewed the company's records, and that he had personal knowledge of the facts) (hereinafter "Proper Foundation"). With respect to objections relating to questions posed at the deposition, it is important to note that Local Rule CV-30 provides that objections to form are waived if not stated during the oral deposition (hereinafter "Waiver").

In the event the Court wants to entertain these hundreds of objections, Defendants have attached a document containing charts similar to those used in Plaintiff's Objections responding specifically to each of Plaintiff's objections. (Ex. F, attached hereto, Plaintiff's Chart Objections with Defendants' Specific Responses.)

XI. Exhibit N to Motion for Summary Judgment

Exhibit N was authenticated and signed by Mr. Bourne during his deposition. (Ex. G, attached hereto, Bourne Dep. 74:18-76:19, 95:2-96:17.) Plaintiff's objections that Exhibit N contains "improper attempt[s] to prove content of a document with secondary evidence" is without merit.

XII. Exhibit P to Motion for Summary Judgment

Exhibit P is a signed declaration that does not need authentication. Nonetheless, Exhibit P was introduced as an exhibit at Mr. Abbott's deposition by Plaintiff's counsel and subsequently authenticated by Mr. Abbott. (Ex. C, attached hereto, 33:4-16.) Further, as Plaintiff is well aware, Mr. Abbott's personal knowledge was established at his deposition.

Plaintiff's objections that Exhibit P contains "improper attempt[s] to prove content of a document with secondary evidence" is unfounded. As explained above, the contents of the referenced documents addressed in the declaration are not hearsay.

XIII. Exhibits S-V to Motion for Summary Judgment

Defendants are not offering Exhibits S, T, U, and V as Summary Judgment evidence.

XIV. Exhibits W and X to Motion for Summary Judgment

Exhibits W and X are self authenticating under Federal Rule of Evidence 902(1). Further, Plaintiff objects to Exhibit W despite the fact that Plaintiff attaches the same document to its Response to the Motion for Summary Judgment. (Exhibit B to Declaration of Michael Edelman in Response.) An objection to an exhibit that is included in the objecting party's filing is "frivolous." *Kesterson v. Donnelley & Sons Co.*, No. CIV.3:01-CV-1625-H, 2002 WL 923921, at *6 (N.D. Tex. May 6, 2002). Moreover, Exhibits W and X are excerpts from the file history of the patent-in-suit. Plaintiff is apparently under the misimpression that patent file histories are inadmissible in patent infringement actions.

XV. Additional Evidence to Rebut Defendants' Objections

If this Court orders Plaintiff to articulate its objections so that they can be understood, Defendants request that they be allowed to file supplemental evidence to support the Summary Judgment evidence and further show the Court the absence of any merit in Plaintiff's Objections. *See Brady v. Blue Cross and Blue Shield of Tex. Inc.*, 767 F. Supp. 131, 135-136 (N.D. Tex. 1991) (granting nonmovant leave to file supplemental evidence in compliance with Rule 56); *Kesterson*, 2002 WL 923921 at **6-7 (allowing party to cure defects in summary judgment evidence); *Gastwirth v. Cigna Group Ins.*, No. Civ. A. 3:97-CV-2481L, 1998 WL 874879, at *4 (N.D. Tex. Nov. 25, 1998) (same). In the event Plaintiff's counsel is able to articulate its objections at a hearing on this matter, counsel for Defendants will certainly be prepared to respond to any objection the Court wishes to entertain.

CONCLUSION

Plaintiff's Objections are frivolous. The Objections were filed as an apparent attempt to divert the Court's attention from the issues presented in the Motion for Summary Judgment. Such an attempt should be rejected. Accordingly, Defendants respectfully request that this Court deny Plaintiff's Objections in their entirety and further request any further relief to which Defendants may be entitled.

April 13, 2007

Respectfully submitted,

By: Joseph D. Gray

William G. Schuurman
Texas State Bar No. 17855200
bschuurman@velaw.com
Brian K. Buss
Texas State Bar No. 00798089
bbuss@velaw.com
Joseph D. Gray
Texas State Bar No. 24045970
jgray@velaw.com
R. Floyd Walker
Texas State Bar No. 24044751
fwalker@velaw.com
VINSON & ELKINS L.L.P.
2801 Via Fortuna, Suite 100
Austin, Texas 78746
Telephone: 512.542.8400
Facsimile: 512.236.3476

Hilary L. Preston
hpreston@velaw.com
VINSON & ELKINS L.L.P.
666 Fifth Avenue – 26th Floor
New York, New York 10103
Telephone: 212.237.0000
Facsimile: 212.237.0100

Douglas R. McSwane, Jr.
State Bar No. 13861300
POTTER MINTON
A Professional Corporation
110 N. College
500 Plaza Tower (75702)
P.O. Box 359
Tyler, Texas 75710
Telephone: 903.597.8311
Facsimile: 903.593.0846
E-mail: dougmcswane@potterminton.com

Counsel for Defendants First Funds LLC, Merchant Money Tree, Inc., and Reach Financial, LLC

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing document was filed electronically in compliance with Local Rule CV-5(a). As such, this document was served on all counsel who are deemed to have consented to electronic service. Local Rule CV-5(a)(3)(A). All other counsel of record not deemed to have consented to electronic service were served with a true and correct copy of the foregoing by First Class Mail on this the 13th day of April, 2007.

/s/ Joseph Gray
Joseph D. Gray